IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1774 OF 2007

The Union of India,)
Directorate of Revenue Intelligence,)
Mumbai Zonal Unit, 13, Vithaldas)
Thackersay Marg, Opp.Patkar Hall,)
New Marine Lines, Mumbai-20.) ..APPLICANT.

Versus

1. Mr.Avinash Bhosale,)
Age-47 years, R/a - Ivory)
Estate, Baner Road, Baner,)
Pune - 4111008.)

2. The State of Maharashtra.) ..RESPONDENTS.

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Mrs.A.S.Pai, Counsel for Applicant-U.O.I.
Mr.Amit Desai, Counsel with V. Kalhatkar, Sujay Kantawala, S. Jadhav, Advs. i/b. M/s. A.L.M.T. Legal, for Respondent No.1.
Mr.S.S.Pednekar, APP, for the State.

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CORAM : SMT.V.K.TAHILRAMANI,J.

DATE : AUGUST 07, 2007.

DATE OF RESERVING THE ORDER : 29th June, 2007.
DATE OF PRONOUNCING THE ORDER: 7th August,2007.

ORAL ORDER :

1. Heard Mrs.Pai, the learned Counsel for the applicant-Union of India and Mr.Desai, the learned counsel for respondent No.1 - original accused.

2. The complainant-Directorate of Revenue Intelligence has preferred this application for cancellation of bail granted to respondent No.1 by the learned Additional C.M.M. in charge of **URGENT BAIL APPLICATIONS** after Court hours by order dated 27th May, 2007.

3. The facts of this case, briefly stated are as under :-

. That the applicant-D.R.I. received specific intelligence that three passengers viz. Avinash Bhosale i.e. respondent No.1 and two others, were to arrive on Emirates flight from Dubai and were attempting to smuggle foreign currency, wrist watches, handsets of mobile phone and other expensive consumer items by not declaring the same to Customs authorities with intention to avoid payment of customs duty. Hence, on 27.5.2007 the officers of DRI maintained surveillance outside the Customs exit gate at CSI Airport, Sahar, Mumbai. At about 3:45 a.m.,

respondent No.1 along with two others came out of the Customs exit gate through green channel and were identified by the DRI officers with the help of their passports. The green channel is specifically meant for passengers who do not have any dutiable goods to declare. All the three persons were specifically questioned by the DRI officers in the presence of independent panch witnesses as to whether they had made true and correct declaration of goods carried by them to the Customs authorities on their arrival in Mumbai. The DRI officers made persistent enquiry with respondent No.1 Avinash Bhosale, thereafter respondent No.1 revealed that he was carrying expensive wrist watches, spectacle frames and mobile handsets purchased abroad during his present trip which was carried by him in the baggage. The respondent was escorted to the office of Customs Air Intelligence Unit (AIU) at CSI Airport, Sahar, Mumbai in presence of panch witnesses. The concerned officers collected the Customs gate pass/exit pass bearing the name of respondent No.1 with date stamp ‘27.05.2007’ from

the gate officer posted at exit gate. The said gate pass did not contain the declaration of any goods. On examining the passport of respondent No.1, it was revealed that they had left Mumbai for Dubai and Europe on 06.5.2007 by Emirates Flight EK 503 and returned back to Mumbai on 27.5.2007.

. On going through the baggage of the respondent besides expensive diamond studded wrist watches worth more than Rs.30 lacs, branded spectacle frames, branded perfumes and other expensive consumer items worth more than Rs.11 lacs were also found. In the baggage, invoices of purchase of the some of the above goods were also found. Besides this, Indian currency and assorted foreign currency in the form of notes and Travellers Cheques were also found, the value of which was equivalent to Indian Rs.9,32,546/-. In the light of above articles, respondent No.1-Avinash Bhosale was further questioned to which he admitted to have purchased the aforesaid branded goods i.e. wrist watches, mobile

handsets, branded spectacles etc. at London and Dubai supported by invoices recovered from him. With regard to the Indian and foreign currency it was also admitted that he had not declared the said currency to the Customs authorities. The officers enquired with him as to whether he had declared the above goods, Indian and foreign currency found in the baggages to the Customs authorities at the time of clearance to which he replied in the negative and also stated that he had not paid any Customs duty on the abovesaid goods.

. The value of wrist watches and other goods which were recovered were found to be far in excess of the permissible limit stipulated for import of bonafide baggage, besides, no duty was paid on the said goods, which was evaded on account of non-declaration of these goods to Customs. In view of these facts the above goods were seized under the provisions of Customs Act in the reasonable belief that they are liable to confiscation under the provisions of the Customs

Act, 1962. The value in respect of wrist watches which were seized from respondent No.1 is approximately Rs.30,20,000/- as could be ascertained on the basis of available bills and other consumer goods, apparels were found to be valued at approximately Rs.11.65 lacs pending evaluation of other items. Respondent No.1 in his statement recorded under Section 108 of the Customs Act, 1962 has interalia admitted that the recovered goods were purchased by him in London and Dubai during his present visit abroad. Respondent No.1 was found in possession of Indian and foreign currency worth Rs.9,96,546/-. Respondent No.1 has also admitted that the said goods and currencies were not declared to the Customs authorities at the time of their clearance through the green channel.

4. In the aforesaid circumstances, the case of DRI is that respondent No.1 attempted to smuggle the abovesaid goods along with Indian and foreign currency without declaring the same to the Customs authorities at the time of the clearance through

the green channel with an intention to evade Customs duty leviable on all the said goods which were seized by the DRI officers. Hence, respondent No.1 has committed offence punishable interalia under Section 135 of the Customs Act and was accordingly arrested by the DRI officers at about 4:30 p.m. on 27.5.2007. Upon arrest, respondent No.1 was medically examined and was handed over to Azad Maidan Police Station on the same day i.e. on 27.5.2007 for safe custody as respondent No.1 was to be produced for remand before the ACMM, 3rd Court, Esplanade Court, Mumbai on 28.5.2007. However, on 28.5.2007 at around 10:30 a.m. the DRI office was telephonically intimated by Azad Maidan Police Station that respondent No.1 was released on bail pursuant to the order passed by the night Magistrate on 27.5.2007. Thereafter the DRI officers made enquiries with Azad Maidan Police Station and it was informed that a bail application was preferred on 27.5.2007 before the night Magistrate on behalf of respondent No.1.

5. It is the specific case of the DRI that without intimating the DRI officers and/or without giving a reasonable opportunity to the DRI department to file their say or produce the relevant papers, an exparte order was passed by the learned night Magistrate and immediately thereafter i.e. on 27.5.2007 itself at around 11:30 p.m. respondent No.1 was released from Azad Maidan Police lock-up.

6. The order of the ld.Magistrate, in charge of **URGENT BAIL APPLICATIONS** after Court hours who granted bail to respondent No.1, reads as under :-

> " Perused the bail application presented by Ld. Adv. Shri Pawar for accused alongwith the vakalatnama and notice copy which he tried to serve on DRI Adv. Advocate Ponda also appeared as Counsel.
>
> After the perusal of the application it appears that the

accused is at present in safe custody of Azad Maidan Police Station. P.S.I. B.K. Desai of Azad Maidan Police Station is also present.

Ld.Counsel relied upon an application No.696 of 2007 delivered by Honourable High Court Bombay wherein order passed in Kuresh Taherbhai Rajkotwala V/s. Union of India and others in Criminal Application No.4264 of 2005 and other judgment mentioned therein, it is contended by Ld. Adv. that respondent did not accept the notice hence no person from DRI is present before me.

Considering the facts of the case and also the goods seized Sec.135(i)(ii) of Custom Act is attracted which is a bailable

offence. No reasonable ground exist to deny bail to the accused person. Hence accused is ordered to be released on bail of Rs.50,000/- (Fifty Thousand) with PR and SB with one SS of like amount or cash deposit of equal amount in alternative. The accused is further directed to deposit cash amount of Rs.15,00,000/- (Fifteen lacs only) as duty amount with Azad Maidan Police Station and DRI is at liberty to collect the same towards duty amount. The Sr.I.P., Azad Maidan Police Station is directed to accept the cash bail deposit and duty amount if deposited by accused and then release the accused. The accused is further directed to attend DRI office for 10 days between 11 to 2 pm. And cooperate the investigation. PSI Shri B.K. Desai is directed to produce all

these papers alongwith order before the concerned 3rd Court on 28.5.2007."

7. The fact that the respondent was indeed carrying various expensive consumer items including wrist watches valued at about Rs.48 lacs and that he was carrying Indian and foreign currency of approximately Rs.10 lacs is not denied by respondent No.1. Not only in his statement under Section 108 of Customs Act he has admitted the same but in his affidavit which has been filed before this Court also it is admitted that he had walked out of the terminal without declaring the dutiable goods and currency notes. Infact he has categorically admitted in his affidavit that he had passed through the green channel without declaring the goods.

8. One of the main grounds raised by DRI for cancellation of bail is that the order was passed exparte and no notice was given to them that such

an application was being moved before the learned night Magistrate. As far as the first aspect is concerned that respondent No.1 had tried to serve DRI, the copy of the said notice is annexed to the present application. It is the case of respondent No.1 that efforts were made to serve the bail application on DRI/its counsel and the same was not accepted. It is further the case of respondent No.1 that intimation of the bail application was also given telephonically to the DRI/its counsel, yet DRI did not appear before the Magistrate. It is noticed that nowhere in the reply is it stated as to where the attempt was made to serve DRI, at what time the attempt was made to serve DRI, which officer was present in the DRI office and who was the person/s in the DRI office who refused to accept the notice.

9. It is noticed that, the notice is addressed to:-

1) DRI Custom Office at Mumbai, and
2) Ms.Niti Pundi, prosecutor.

. First of all DRI has a separate office and it is a distinct and separate department from the Customs department. So also Customs is an entirely independent and separate department. The DRI office is at Marine Lines whereas the Customs Office is at Ballard Estate. It is not known in what circumstances, the notice is addressed to "DRI Custom Office" and where it was served whether at Marine Lines or at Ballard Estate because the address is simply stated "at Mumbai". There is no such office as "DRI Custom Office". Hence the bail application could not have been possibly served on "DRI Custom Office" as no such office exists in Mumbai.

10. In the bail application, it is stated that the I.O. Mr.Shaikh, Mr.Mehta and Government Prosecutor Ms.Niti Pundi did not accept service. As far as service on Ms.Niti Pundi, Prosecutor is concerned, respondent No.1 was arrested at about 4:30 p.m. on 27.5.2007. The application for bail was moved on 27.5.2007 itself. At that time no remand application was in existence. As such

there was yet no occasion or opportunity for DRI to allocate the said matter to any Prosecutor leave alone Ms.Niti Pundi. Ms.Niti Pundi is just one of the Prosecutors on the Panel. Hence giving her notice in a matter which has not yet been assigned to her is of no use. The normal procedure is, notice is first given to the Department, the Department then allots the matter to a Prosecutor and thereafter the Prosecutor will represent DRI in the Court in the said matter. By serving any prosecutor on the panel who has not yet been allotted the matter cannot be constituted as service. As respondent No.1 was arrested around 4:30 p.m. on 27.5.2007, the case was still at a preliminary stage of investigation and the DRI Department had not yet appointed Ms.Niti Pundi, Prosecutor to appear in the matter nor had it assigned the matter to her. In the affidavit of DRI dated 15th June, 2007 it is categorically stated that Ms.Niti Pundi has informed the DRI that she had not received any telephone call either from the Advocate, friend or relative of respondent No.1 pertaining to the said subject

matter. As far as service on Mr.Mehta is concerned, it is stated that he had completed his work in the afternoon on the said day and had left for his residence and he had not received any telephonic call pertaining to the said bail application. In the very same affidavit of Mr.K.A.Shaikh, Assistant Director, DRI, wherein the above facts are stated, Mr.Shaikh has further stated that he is supervising the investigation in the capacity of Assistant Director of DRI, he has specifically stated that he has not received any call from any person identifying himself as an Advocate or his authorised representative and/or any person claiming to be the friend or relative of respondent No.1 informing him about filing of bail application before the concerned night Magistrate.

11. The learned Counsel for respondent No.1 submitted that infact telephone calls were made to inform the DRI officers about the bail application being moved. In support of this contention, he stated that he has mobile printouts to prove the

same. I find that the stand taken by respondent No.1 is not consistent. Ground 4 of the bail application moved before the learned night Magistrate indicates that an attempt was made to serve the bail application physically in person on the Officers of DRI and on the Government Counsel. It is pertinent to note that in the affidavit now filed by respondent No.1 it is now stated that the intimation of the bail application was telephonically given to DRI/its Counsel and despite this they did not attend the hearing. Hence the version regarding service of the bail application is now changed and modified from personal service to telephonic intimation by way of attempt to serve the notice to the Department.

12. The application for bail should have been served in advance to the Department to enable the department to effectively represent the case and to apprise and brief the concerned Government Counsel who would appear in the case. In the present case the said requirement has not been

complied with by advocates of respondent No.1. Moreover telephonic intimation cannot legally be constituted to be effective service under any prescribed procedure. The fact about telephonic intimation was never brought to the notice of the night Magistrate, hence the said fact clearly indicates that the telephonic intimation claimed to have been made to the department is an afterthought and generated to justify the exparte order obtained by respondent No.1. It is pertinent to note that, in the affidavit filed by respondent No.1, it is not stated as to who has made these calls and to whom and at what time. No details are given in support of this contention though respondent No.1 had sufficient opportunity to do so. Looking to the material on record and the averments in the affidavit, it does appear that notice, as strictly contemplated, was not served on the DRI.

13. As far as service of notice is concerned, one other aspect which is noticed is that though it is stated in the notice that they were moving before the night Magistrate for bail on 27.5.2007

at 9:30 p.m., the time mentioned on the said notice is 8:30 p.m., the DRI office remains open from 9:30 a.m. to 6:00 p.m. In such case, it was necessary for the respondent No.1’s counsel to state as to which office they had approached, who was the person to whom they tried to serve the notice, at what time they tried to serve the notice and other relevant details, but, no details have been stated anywhere, despite sufficient opportunity being available.

14. It is the contention of DRI that on the particular night of 27th May, 2007, the Magistrate who has been entrusted with the work as Night Magistrate for Urgent Bail Applications was originally ACMM Shri.R.B.Chorghe and ACMM Shri.Shisode did not have the power to deal with urgent bail application on 27th May,2007. In this connection reliance was placed by the DRI on Office Order No.Estt.16/417/2007 issued by CMM’s Office dated 8th March, 2007 which shows that on 27th May, 2007 the charge of Holiday and Sunday Court of Metropolitan Magistrate was with the ACMM Shri.R.B.Chorghe. I have carefully perused the said Office Order and it is noticed

that this Office Order only relates to holding charge of Holiday and Sunday Court by the learned Metropolitan Magistrate on those days only between 11:00 a.m. to 2:00 p.m. and not at night. The said work was to be carried out in the respective Courts. From the Notification No.CMM/GC/44 of 2007 issued by CMM's Office dated 8th March, 2007, it is seen that the work relating to urgent bail applications after Court hours on working days, Sundays and Holidays in the month of May was entrusted to ACMM Shri.V.K.Sharma. Thus even on 27th May, 2007 the work of Night Magistrate was assigned to ACMM Shri.V.K. Sharma. However, by Office Order No.Estt.16/639 of 2007 issued by CMM's Office dated 30th March, 2007 Concession Leave came to be granted to various Magistrates. By the said Office Order, ACMM Shri.V.K. Sharma was granted Concession Leave from 28.5.2007 to 09.6.2007 and during the said period the charge was to be held by ACMM Shri.S.Y. Shisode. Originally ACMM Shri.V.K.Sharma was granted leave from 28.5.2007 to 09.6.2007. However, thereafter Shri V.K.Sharma wanted to prefix 26.5.2007 and 27.5.2007 being holidays to his leave from

28.5.2007. Hence as per the usual office procedure, the learned ACMM Shri V.K. Sharma orally requested his colleague i.e. ACMM Shri.Shisode to do the work on these days and to look after the work of urgent night bail applications on 26th and 27th May, 2007. It was in such circumstances that the matter was heard and disposed of by Shri.S.Y.Shisode, who passed the impugned order on 27th May, 2007. In view of the above facts, the learned ACMM Shri.S.Y.Shisode did have the power to consider urgent night bail applications on 27th May, 2007.

15. Looking to the fact that as originally it was another Magistrate who was to deal with the matter and the matter was thereafter dealt by another learned Magistrate, it was necessary on the part of the learned advocate for respondent No.1 to mention in the notice as to who was the night Magistrate, the address of the night Magistrate and where the application was to be heard. No such details are given in the notice. As the matter was to be originally heard by the learned Magistrate Shri V.K. Sharma, but, it was

infact heard by the learned Magistrate Shri S.Y.Shisode, intimation ought to have been given to DRI that the matter would be moved before the said Magistrate. It was also necessary on the part of the learned advocate for respondent No.1 to mention the name of the Judge, the place at which the application is to be heard i.e. whether it was to be heard in Court or at the residence of the Magistrate and the exact address thereof. The stand of respondent No.1 keeps changing. The earlier stand was written notice was given. In fact, during the course of the arguments before me also it was stated that notice was served at the DRI office. Later, it was stated that notice was given telephonically. Looking to all the facts, the service of notice appears a little doubtful. Even assuming that notice was given, it is quite apparent that notice as strictly contemplated was not served on DRI. Moreover the fact admittedly remains that DRI was not present at the time of hearing and the order was passed exparte.

16. Mrs.Pai, the learned Counsel for DRI submitted that the learned Magistrate was not at

all justified in entaining the application for bail in the absence of any representative of DRI. Respondent No.1 was arrested only around 4:30 p.m. on 27.5.2007, which was a Sunday and he would have been produced before the regular Court in the morning on 28.5.2007. In such case there was absolutely no urgency for the learned Magistrate to entertain the said bail application. She submitted that the learned Magistrate ought to have directed that the application be placed for hearing before the regular Court taking up bail applications. The regular Court would have heard the application in the morning with due notice to the other side. She further submitted that the learned Magistrate has not considered the gravity of the charge and the fact that admittedly respondent No.1 had walked through the green channel without declaring the goods. The value of the goods and currency was huge. The learned Magistrate has also not considered the fact that the investigation was at a crucial stage. No papers were before the learned Magistrate, in such case, the learned Magistrate without all the relevant material being put before him ought not

to have granted bail to respondent No.1. Thus, she submitted that there was impropriety on the part of the learned Magistrate in granting the bail with such haste and in passing the impugned order in the manner indicated above.

17. Obviously the night Magistrate is meant only for hearing extremely urgent applications which cannot wait till the next day morning. The notification dated 8th March, 2007 clearly mentions that the Magistrate mentioned therein will attend the "**URGENT BAIL APPLICATIONS**" after Court hours. The present application was not of such a type i.e. of urgent nature. The order is not passed on the ground of any urgency of which the learned Magistrate was convinced or that the learned Magistrate was further convinced that it was not possible to wait till the next day morning and it was absolutely necessary to urgently pass some orders. In normal course, the matter would have gone to the Magistrate regularly taking bail applications in the morning. The learned Magistrate was expected to entertain only extremely urgent matters, which cannot be

postponed till next day morning. The impugned order cannot be said to be a judicial order passed after giving reasonable opportunity of being heard to the opposite party. Officers of DRI were not expected to know as to who was the night Magistrate on that day and what is his residential address. In a place like Mumbai very often it would be impossible to contact the concerned Advocate and to reach the place where the matter is to be heard in time even if the address is disclosed. Such an order shocks the judicial conscience of this Court and the practice of passing such orders without hearing the other side has to be nipped in the bud. If not checked by the High Court it is likely to send wrong signals to the accused and also to the subordinate judiciary.

18. Mrs.Pai has also pointed out that there is serious misrepresentation in the application for bail preferred on behalf of respondent No.1. In the said bail application it is stated that the goods do not fall under Section 123 of the Customs Act and therefore the offence would fall under

Section 135(1)(ii) of the Customs Act, which is bailable one. As far as this aspect is concerned, it is seen that a number of wrist watches came to be seized from respondent No.1. The said wrist watches were expensive wrist watches and some of them were studded with diamonds. The wrist watches are items which are clearly covered by Section 123 of the Customs Act and hence it is obvious that the statement made in the bail application that the goods do not fall under Section 123 of the Customs Act is slightly erroneous. Mrs.Pai submitted that the bail order obtained on the basis of such an erroneous statement cannot be sustained and it deserves to be set-aside.

19. Although attempt was made to canvas on behalf of the respondent that the case would fall under Section 135(1)(ii) of Customs Act and hence the offence being bailable it was obligatory on the part of the Magistrate to grant bail. However, I do not find much merit in this submission because at the relevant time nobody represented the DRI to point out whether the case

fell under Section 135(1)(i) or 135(1)(ii) of the Customs Act. The relevant material was not before the learned Magistrate. Hence, the learned Magistrate could not have come to the conclusion that the case fell under Section 135(1)(ii) of the Customs Act. Without seeing the entire record, the learned Magistrate assumed that the case fell under Section 135(1)(ii) of the Customs Act and he assumed that the decision of this Court in the case of **Kuresh Taherbhai Rajkotwala in Criminal Application No.4264 of 2006** would apply.

20. While granting bail, the learned Magistrate has placed reliance on the decision of this Court in the case of **Kuresh Taherbhai Rajkotwala in Criminal Application No.4264 of 2006**. In the said case the applicant-accused therein was concerned with the fraudulent import of goods i.e. fabrics against Advance Licence under the DEEC Scheme issued in the name of one party and these goods were fraudulently obtained and diverted in the local market. In the said case it was held that Section 135(1)(ii) of the Customs Act was applicable and it was held to be bailable and

hence the accused therein was released on bail. The decision in the case of **Kuresh Rajkotwala** (supra) is by a learned Single Judge of this Court and it is dated 1st December, 2006. However, thereafter the very same learned Single Judge in decision dated 18th December, 2006 passed in Criminal Application No.4233 of 2006 (Deepak Gopaldas Bajaj Vs. State of Maharashtra) has held that the notification under Section 123 of the Customs Act applies to the goods which were seized in the said case i.e. fabric. It was further observed that once such is the case, then the seizure is under the reasonable belief that goods are smuggled. Therefore, Section 123(1) would apply. In the said case, anticipatory bail application preferred by the accused came to be rejected holding that a case is made out for custodial interrogation. In the present case, had the counsel for DRI been present, he would have pointed out the decision in the case of Deepak Gopaldas Bajaj. As no notice or no proper notice was given to DRI, nobody represented DRI and the decision in the case of Deepak Bajaj could not be pointed out.

21. Mrs.Pai, also submitted that the offence of respondent No.1 is not limited to the goods which came to be seized from him when he came out of the green channel at Sahar Air Port. She submitted that thereafter the investigation commenced and it is found that respondent No.1 is also involved in import of foreign cars in respect of which there is duty evasion running into crores of rupees. She submitted that in such case bail ought not have been granted to respondent No.1. She submitted that if the matter had been placed before the regular Court this aspect would have been pointed out to the Court by the DRI officials and they would have strongly opposed the grant of bail on various grounds including the ground that the offence squarely fell under Section 135(1)(ii) of the Customs Act. As far as the aspect relating to cars is concerned, I find that the panchnama in relation to cars is from about 1:30 p.m. to about 10:30 p.m. of 28.5.2007. Hence at 11:00 O'clock if the matter had come up before the regular Court, the DRI could not have relied on this panchnama. Hence, I am not inclined to accept the

statement that on 28.5.2007 at about 11:00 a.m. the fact of evasion of duty running into crores of rupees in relation to the cars imported by the petitioners could have been pointed to the regular Court and bail could have been opposed on this ground. However, at 11:00 a.m. it was very much possible for DRI to point out that further investigation is going on, the investigation was at a very crucial stage and more material would be available against respondent No.1. Moreover as the respondent was arrested at 4:30 p.m. on 27.5.2007, the respondent had to be produced for remand by 4:30 p.m. of 28.5.2007 hence by about 2:00 p.m. it was very much possible for DRI to inform the Court about the aspect relating to the cars. However, as DRI was not represented, they could not point this out to the regular Magistrate, which fact may have been capable of influencing the Magistrate.

22. As far as duty amount computed by the learned Magistrate of Rs.15 lacs is concerned, it is not known on what basis the learned Magistrate arrived at such an amount. As stated earlier, the

entire record was not before the learned Magistrate, the remand application was not produced before the learned Magistrate, the DRI officer was not present before the learned Magistrate, hence, one fails to understand the basis on which the learned Magistrate arrived at this figure of Rs.15 lacs. As far as duty on goods is concerned, the procedure normally is that first the details would be given in the remand application, thereafter show cause notice would be given to the accused, and only after the investigation was complete then only can the duty be computed. The fact that respondent No.1 has deposited Rs.15 lacs is of no consequence because duty amount has to be given only under the scheme and rules made.

23. Mr.Desai, the learned Counsel for respondent No.1 submitted that offence would fall under Section 135(1)(ii) of the Customs Act which is a bailable offence and hence in such circumstances, the accused person ought to be released on bail on the accused preferring an application. He has submitted that hence no fault

can be found with the learned Magistrate for granting bail. As far as this aspect is concerned, it is seen that this aspect would be confined only to respondent No.1 walking out of the green channel without declaring dutiable goods and foreign currency. As no counsel for DRI was present before the Magistrate and all the relevant material was not before the learned Magistrate, in such circumstances it was erroneous on the part of the learned Magistrate to reach the conclusion that the offence fell under Section 135(1)(ii) of the Customs Act which is a bailable offence.

24. As far as DRI is concerned, it is their case that the action of respondent No.1 at the Air Port and the further investigation clearly reveals that the case would fall under Section 135(1)(ii) of the Customs Act. It is categorically stated that further investigation shows a very serious offence which requires detailed investigation.

25. In his statement under Section 108 of the Customs Act, respondent No.1 has admitted that he has passed through the green channel without

declaring the goods. The said fact is also admitted by him in his affidavit before this Court. Respondent No.1 is veteran traveller. He has travelled abroad innumerable times. Infact, it is admitted by him in his statement and is also evident from his passport that he has travelled abroad on numerous occasions. In such case, respondent No.1 was very well aware of the procedures and implications of passing through the green channel without declaring the goods. It is the case of respondent No.1 that he passed through the green channel only because he was fatigued. That can hardly be an explanation for passing through the green channel with dutiable goods and currency worth almost half a crore of rupees.

26. In the present case, the learned night Magistrate has not seen all the material available against the respondent No.1 and has granted bail. In the case of **Puran Vs. Rambilas and another** reported in **AIR 2001 S.C. 2023**, it is observed that, one such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed.

Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. Wrong exercise of discretion by the trial Court has to be corrected. Further it is to be kept in mind that the concept of setting aside the unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by the Supreme Court in the case of **Gurucharan Singh Vs. State (Delhi Admn.)** reported in **AIR 1978 SC 179 : 1978 Cri.LJ 129**.

27. In the present case, it is seen that notice as strictly contemplated was not served on DRI. Moreover, the fact admittedly remains that DRI was not represented at the time of hearing of bail application of respondent No.1 and the order was passed by the night Magistrate exparte. In my opinion, the learned night Magistrate ought not to have passed the order in such haste without hearing the counsel for the other side. Moreover

bail was granted without seeing the entire record. The learned night Magistrate should have seen the entire record moreso as there was no urgency regarding grant of bail. The appointment of the learned Magistrate was only for **URGENT BAIL APPLICATIONS** after Court hours, there was nothing urgent about the present bail application. No reference to any urgency was made by the learned Advocate for the respondent or even by the learned Magistrate. The learned Magistrate completely lost sight of the fact that his appointment was to hear only "URGENT" Bail Applications. Moreover, I find that there is a slight misrepresentation in the application for bail preferred by respondent No.1 which states that the goods do not fall under Section 123 of the Customs Act. In view of all the above facts, the order passed by the learned night Magistrate cannot be allowed to stand. Hence, the order dated 27th May, 2007 passed by the learned Additional C.M.M. (night Magistrate) in charge of Urgent Bail Applications, releasing respondent No.1 on bail is quashed and set-aside. Respondent No.1 is granted time till 2:00 p.m. on 17th August, 2007 to surrender before DRI.

28. As stated earlier, the case of respondent is that the case is bailable, whereas the stand of the applicant is that the material on record shows that the offence is non-bailable. As stated in the earlier Para, the respondent No.1 has been granted time to surrender. In the meantime, it would be open to respondent No.1 to surrender before the Magistrate and seek bail. It would also be open to respondent No.1 to prefer an application for anticipatory bail before the Sessions Court if so advised. In case, if such an application is moved by respondent No.1, the learned Judge shall decide the same without being influenced by any of the observations made in this order.

29. Criminal Application is allowed in above terms.

(SMT.V.K.TAHILRAMANI,J.)